ANTARA CONCRETE ENGINEERING PRODUCTS SDN. BHD.

v.

MOHD AMIN BIN HASSAN & 3 ORS.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 22-145-91]
7 MAY 1994

PRACTICE & PROCEDURE: Application by defendants for further arguments - Appeal allowed against dismissal of O. 14 application by SAR - Whether any triable issues - Plaintiff entering into agreement to supply construction materials to Syarikat Berjaya for government project - Materials delivered - Payments outstanding - Defendants partners of Syarikat Berjaya - Defendants contending plaintiff dealing with different Syarikat Berjaya - Defendants exhibiting proof of another Syarikat Berjaya - Whether sufficient to raise triable issue - Affidavits indicating supply agreement for government project carried out by defendants firm and not other Syarikat Berjaya.

PARTNERSHIP: Contention that supply agreement made solely by 4th defendant without knowledge of 1st, 2nd & 3rd defendants - Whether all partners bound by act of one - Consideration of ss. 7 & 8 Partnership Act 1961.

The case before the Court was an application by the defendants for further arguments after the plaintiff's appeal against the dismissal of its O.14 application against the 1st, 2nd and 3rd defendants was allowed in chambers.

The plaintiff entered into an agreement (the supply agreement) to supply construction materials to Syarikat Berjaya for a government project. The materials were duly delivered but a sum of RM130,517.70 plus interest remained due and owing to the plaintiff. The defendants admitted that the four of them were partners of a firm called "Syarikat Berjaya" but denied having any dealings with the plaintiff and claimed that the plaintiff's agreement was with another Syarikat Berjaya. The defendants exhibited proof of the existence of another Syarikat Berjaya which had a different registration number and trading address. The 4th defendant was listed as a partner in both firms.

The issue before the Court was whether it was the defendants' firm that was being sued and if so, whether there were any triable issues.

Held:

[1] Merely showing the existence of two Syarikat Berjaya was not itself sufficient for the purpose of satisfying the Court that there was a triable issue.

[2] From the nature of the project and the address of Syarikat Berjaya mentioned in the supply agreement and relying on the other documents exhibited it could reasonably be inferred that the Syarikat Berjaya mentioned in the agreement was none other than the defendants' Syarikat Berjaya. First, there was the letter from the Pejabat Jurutera Daerah, Jabatan Kerja Raya Kuala Langat which confirmed there was such a project as mentioned in the supply agreement, naming the contractor as "Syarikat Berjaya", the address of the contractor and the name of the officers of the contractor; namely, the 3rd and 4th defendants respectively.

[3] What was more prejudicial to the defendants' case was an agreement (the partnership-cum-project agreement) entered into between the four partners of the defendants' firm which provided for the 4th defendant joining the partnership with effect from 22 April 1987. The project was mentioned in the agreement. In clause 3 it was provided:

> 3. Pihak pertama membenarkan pihak kedua menggunakan alamat No: 281, Jenjarom N/V, Kuala Langat, Selangor untuk segala urusan surat menyurat berkenaan projek tersebut.

Referring back to the supply agreement, it will be recalled that Syarikat Berjaya, who was the other party to the agreement also had the same address - No: 281, Jenjarom N/V, Kuala Langat, Selangor. Therefore the Syarikat Berjaya mentioned in the supply agreement and in the partnership-cum-project agreement was one and the same firm involving the same four partners, the four defendants.

[4] There was no merit to the 1st, 2nd and 3rd defendants' alternative defence that the agreement was made solely by the 4th defendant without their knowledge as it was clear from clause 1 of the partnership-cum-project agreement that it was agreed by all the four defendants that whatever was to be done by the 4th defendant in relation to the project was to be in the name of their firm. Furthermore, the 1st, 2nd and 3rd defendants were caught by ss. 7 & 8 of the Partnership Act 1961.

[Further arguments dismissed. Order allowing plaintiff's appeal confirmed].

Cases referred to:
Eng Mee Yong & Ors. v. Lethumanan [1979] 2 MLJ 212 ***(foll)***
Bank Negara v. Mohd Ismail [1992] 1 MLJ 408 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14
Partnership Act 1961, ss. 7 & 8

For the plaintiff - Ramdhari; M/s K.C. Yap Kamaludin & Partners
For the defendant - K. Thavanesan; M/s Singa & Co.

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:
This was an appeal against the decision of the Senior Assistant Registrar dismissing the plaintiff's application for summary judgment against the first, second and third defendants pursuant to O. 14 of the Rules of the High Court. I had allowed the appeal and the defendants had applied for further arguments in open Court. The open Court hearing was held on 11 March 1994. At the end of the hearing I dismissed the defendants' further arguments and confirmed the order that I had earlier made in chambers.

The plaintiff claimed that it had entered into an agreement (hereinafter referred to as the "supply agreement) with one Syarikat Berjaya on the 6 July 1987 whereby the firm had agreed to purchase from the plaintiff construction materials. The plaintiff alleged that all the four defendants were partners of the firm. The plaintiff further claimed that it had supplied the construction materials to the firm and that the firm still owed the plaintiff RM130,517.70 (plus interest).

The defendants admitted the four of them were partners of a firm by the name of "Syarikat Berjaya" but denied having any dealing with the plaintiff. They averred that the firm or partnership with whom the plaintiff had entered into an agreement (hereinafter referred to as the "supply agreement") and to whom the plaintiff had delivered the goods was a different Syarikat Berjaya; in other words, the defendants contended that the plaintiff had dealt with another Syarikat Berjaya (hereinafter shall be referred to as the "other Syarikat Berjaya"). The defendants averred that their Syarikat Berjaya had its business registration number as **615991-T** and the trading address as **No. 111C, Kawasan, 16, Berkeley Town Centre, Off Jalan Batu Tiga Lama, 41300 Klang, Selangor,** whereas the other Syarikat Berjaya against whom the claim should have been brought had the registration number **715105-T** and the trading address at **Kampung Jenjarom, Kuala Langat, 42500, Selangor Darul Ehsan.**

The plaintiff sought to show that there were no merits in the defence.

In considering whether there were any merits in the defence, it was convenient, as a first step to dispose of one particular issue: whether the four defendants were partners of the firm (Syarikat Berjaya) referred to in paragraph 2 of the statement of claim. In other words, the question was whether it was the defendants' firm (as opposed to the other firm) that was being sued by the plaintiff. It was necessary to dispose of this question in view of paragraph 3 of the statement of defence wherein the defendants disputed that it was their firm that was being sued.

Paragraph 3 states:

> 3. Defendan pertama, kedua dan ketiga mengaku bahawa mereka adalah rakankongsi Syarikat Berjaya tetapi menyangkal sama sekali dakwaan plaintiff bahawa Syarikat Berjaya yang didakwa dalam guaman ini adalah Syarikat Berjaya yang sama.

On this question, although, initially, as shown by the above paragraph 3, the defendants disputed the allegation in the statement of claim that the "Syarikat Berjaya" referred to therein was their Syarikat Berjaya (as opposed to the other Syarikat Berjaya), it was clear, however, that they subsequently abandoned this line of defence: for, the defendants, in paragraph 3 (e) (i) of their affidavit in reply (encl. 11), impliedly admitted that it was their partnership that was being sued. In that paragraph the defendants stated:

> 3. (e) Sebagai menjawab perenggan ke 13 dan 14, defendan ingin mengatakan seperti berikut:
>
> (i) Keempat-empat defendan yang dinyatakan dalam tindakan ini adalah rakan kongsi firma yang dinamakan sebagai Syarikat Berjaya yang telah didaftarkan dengan sahnya di pendaftaran perniagaan di bawah nombor pendaftaran 000615991 T. Sesalinan dokumen tersebut yang disahkan sebagai salinan yang sah oleh pendaftaran perniagaan dilampirkan di sini dan ditandakan sebagai eksibit "MSI-2".

Having disposed of that line of defence, I proceeded to consider whether on the affidavits as a whole the defendants had raised any triable issue.

The existence - perhaps, rather strangely- of the two Syarikat Berjaya was shown by the defendants' affidavits. According to the records issued by the Registrar of Business (see Exh. MIS 2 of the defendants' affidavit in reply *vide* encl. 11), there were two partnerships which had the name "Syarikat Berjaya". There was a "Syarikat Berjaya" registered with the Registrar of Business on 3 November 1983 and having registration number 000615991 T and its main trading address at No. 111C, Kawasan 16, Berkeley Town Centre, Off Jalan Batu Tiga Lama, Klang Selangor. The partners of this partnership were the four defendants.

There was, however, another Syarikat Berjaya. This firm was registered on the 15 January 1987, had a registration number 000715105 T and its main trading address as M-11, Jalan Besar, Sungai Jarom, 42600 Kuala Langat, Selangor Darul Ehsan. The partners were Ang Kok Toh, Zuria bin Ismail, and the fourth defendant, Ismail bin Rahmat.

However, merely by showing the existence of two Syarikat Berjaya was not in itself sufficient for the purpose of satisfying the Court that there was a triable issue.

Regarding evidence on affidavits, Lord Diplock, delivering the judgment of the Privy Council in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 had this to say at p. 217:

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself may be.

Although Lord Diplock was dealing with an application for the removal of caveat in that particular case, nevertheless the Supreme Court in *Bank Negara v. Mohd Ismail* [1992] 1 MLJ at p. 408 was of the view that the above principle of law is relevant and applicable in all cases where a Judge has to decide a case or matter on affidavit evidence.

Judging from the affidavits, it appeared to me that the defendants affidavits, in particular, the documents exhibited, did not support the defence contention (that it was not their Syarikat Berjaya that made the supply agreement - if at all there was any - with the plaintiff). Indeed, on the contrary, and to a large extent, those affidavits confirmed the plaintiffs contention that the other party to the supply agreement was the defendants Syarikat Berjaya and not the other Syarikat Berjaya.

The supply agreement, exhibited by the plaintiff in its supporting affidavit (Exh WKN-1 of encl. 6), reads:

> This agreement is made on 6 July 1987 by and between Syarikat Berjaya of 281, Jenjarom N/V, 42600 Kuala Langat, Selangor (hereinafter called "Buyer") and Concrete Engineering Products Sdn. Bhd. of 437-C Jalan Ipoh, 51200 Kuala Lumpur (hereinafter called "Seller"). The Buyer agrees to buy and the Seller agrees to sell approximately 4,900 metre of 600 mm diameter specially designed prestressed spun concrete piles at the rate of RM108 per metre subject to the following terms and conditions.

It was clear from the affidavits of both parties that the supply agreement concerned the supply of materials for a government project carried out by the defendants' firm (and not by the other firm). It is important to note that in the supply agreement the purpose of the agreement was to supply construction materials for the purpose of the following project:

> 1. Project : Supply & Delivery of Prestressed Spun Concrete Piles for Pembinaan Lima Jambatan Di Daerah Kuala Langat, Selangor.

From the nature of the project and the address of the firm (Syarikat Berjaya) mentioned in the supply agreement and relying on the other documents exhibited by the affidavits, it could, in my view, reasonably be inferred that the "Syarikat Berjaya" mentioned in that agreement was none other but the defendants' Syarikat Berjaya. First, there was the letter from the Pejabat Jurutera Daerah, Jabatan Kerja Raya Kuala Langat dated 29 April 1992 (see Exh. AYH-5 of the plaintiff's third affidavit at encl. 13). This letter, first of all, confirmed that there was such a project as mentioned in the supply agreement. In this letter, (which was a reply to an inquiry from the plaintiff's solicitor), the project was referred to as "Pembinaan Lima (5) Jambatan Konkrit di Daerah Kuala Langat, Selangor Darul Ehsan"; the name of the contractor was mentioned as "Syarikat Berjaya"; the address of the contractor was given as:

> 1. No. 281, Jalan 18,
> Sungai Jarom New Village

42600 Kuala Langat
Selangor Darul Ehsan

2. No. 111A, Kawasan 16
Off Jalan Batu Tiga Lama
41200 Klang

and the name of the officers of the contractor ("Nama Pegawai Syarikat") were given as Encik Ismail bin Rahmat and Encik Md. Isa bin Salim - and these persons; named are in fact the fourth and third defendants respectively.

Secondly, and what was more prejudicial to the defendants' case, was an agreement (hereinafter referred to as the "partnership-cum-project agreement") entered into between the four partners of the defendants' firm, dated 2 June 1987, and attached to the defendants' affidavit in reply (see Exh. MIS-1, encl. 14); and which provided for the fourth defendant joining the partnership with effect from 22 April 1987 (originally there were only three partners in the partnership -the first, second and third defendants). The "JKR 5 - bridge" project was mentioned in the agreement. Although clause 1 of this partnership-cum-project agreement provided for the giving of a free hand to the fourth defendant in managing the project, nevertheless, in the same clause it was also provided that, whatever was to be done by the fourth defendant, it was to be done in the name of the defendants' firm. This clause reads:

> 1. Pihak pertama [first, second and third defendants] dengan ini bersetuju membenarkan pihak kedua [the fourth defendant] mengendalikan apa jua urusan serta menandatangani segala surat menyurat dan dokumen-dokumen bersabit dengan projek tersebut di atas nama syarikat [Syarikat Berjaya] tersebut.
> [Emphasis added]

It was clear that "syarikat tersebut" here referred to the Syarikat Berjaya in which the four defendants were partners and not to the other Syarikat Berjaya. For, in the preamble and the first paragraph of the recital to this agreement, it was declared:

> Suatu Perjanjian diperbuat pada 2 Jun 1987 di antara Md Isa bin Salim (No. K/P: 4247294) yang beralamat di No: 301, Blok 7, Jalan 18/43, Shah Alam, Selangor, Siti Rahmah bte Abd Wahab (No. K/P: 4612446) yang beralamat di No: 196, Kg. Kuantan, Klang, Selangor dan Mohd Amin bin Hassan (No. K/P: 3762693) yang beralamat di No: 196, Kg. Kuantan, Klang, Selangor (kemudian dari ini disebut "Pihak Pertama") sebagai pihak pertama dan Ismail bin Rahmat (No. K/P: 3595279) yang beralamat di Kampong Jenjarum, Kuala Langat, Selangor (kemudian dari ini disebut "Pihak Kedua) sebagai pihak yang lain.
>
> Bahawasanya kedua-dua pihak telah bersetuju menjadi ahli-ahli kongsi sebuah syarikat perkongsian dengan nama Syarikat Berjaya yang beralamat di No. 3, Jalan 6, Kawasan 15, Off Jalan Bukit Kuda, Klang, Selangor (kemudian dari ini disebut "Syarikat tersebut") mulai dari 22 April 1987 dengan syarat pihak pertama dibenarkan menjadi ahli kongsi utama di dalam syarikat tersebut.

Then, in clause 3, it was further provided:

> 3. Pihak pertama membenarkan pihak kedua menggunakan alamat No: 281, Jenjarom N/V, Kuala Langat, Selangor untuk segala urusan surat menyurat berkenaan projek tersebut.
> [Emphasis added]

Now, referring back to the supply agreement mentioned earlier, it will be recalled that the Syarikat Berjaya, who is the other party to that agreement, also had the same address - No: 281, Jenjarom N/V, Kuala Langat, Selangor. Therefore the Syarikat Berjaya mentioned in the supply agreement and the Syarikat Berjaya mentioned in the partnership-cum-project agreement is one and the same firm involving the same four partners, that is to say, the four defendants

Finally, there was the defendants' alternative defence that even assuming that the Syarikat Berjaya referred to in the supply agreement was their Syarikat Berjaya, that agreement was made solely by the fourth defendant with the plaintiff without the knowledge of the first, second and third defendants, and therefore they could not be held liable for the payment of the material delivered by the plaintiff pursuant to the agreement. Again, there was no merit in this defence for, as had already been pointed out, it was clear from clause 1 of the partnership-cum-project agreement that it was agreed by all the four defendants that whatever was to be done by the fourth defendant in relation to the project was to be in the name of their firm. Furthermore, the first, second and third defendants were caught by ss. 7 and 8 of the Partnership Act 1961 (Act 135) which states:

> **7. Power of partner to bind firm.**
>
> Every partner is an agent of the firm and his other partners for the purpose of the business

of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

8. Partners bound by acts on behalf of firm.

An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners:

Provided that this section shall not affect any general rule relating to the execution of deeds or negotiable instruments.

Accordingly, I allowed the appeal by the plaintiff.

BANK KERJASAMA RAKYAT BERHAD

v.

ANTHONY GOMEZ S/O CLEMENT ANDREW GOMEZ & ANOR.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[ORIGINATING MOTION NO. 25-9-93]
20 APRIL 1993

PRACTICE & PROCEDURE: Plaintiffs given judgment in an action for defamation - Magistrate fixing another date for hearing of the assessment of general damages - Defendant claiming that quantum of damages should be determined at the time of delivery of decision - Defendant filing appeal against Magistrate's decision - Defendant applying to stay the proceedings relating to assessment of general damages until the disposal of the appeal - Principles applicable in an application for stay of proceedings - Whether there were merits in the defendant's application.

The plaintiffs/respondents suceeded in their action for defamation against the defendant/applicant. The learned Magistrate fixed another date for the hearing of the assessment of general damages. The applicant appealed against the decision of the learned Magistrate and applied to the Magistrates Court for a stay of proceedings pending the disposal of the appeal which application was rejected.

The applicant then applied to the High Court to stop the learned Magistrate from proceeding to assess the general damages, on the date that had been fixed, until the disposal of the appeal. In support of the application, the applicant argued that the learned Magistrate should, as a matter of legal procedure, determine the quantum of general damages at the time of delivering her decision. The applicant further argued that the fixing of a date for the assessment of general damages tantamounts to an abuse of the process of the Court in that the learned Magistrate by doing so was giving the respondents an opportunity to reopen the case at the hearing of the assessment.

Held:

[1] A stay of proceedings is a matter of discretion and the Court must exercise its discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties. The Court must exercise its discretion whenever it is just and reasonable to do so.